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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-162

THE WISCONSIN BOARD OF REGENTS OF STATE COLLEGES AND ROBERT E. GUILES,
PETITIONERS

v.

DAVID F. ROTH, FOR HIMSELF AND FOR ALL OTHERS SIMILARLY SITUATED,
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS, *AMICUS CURIAE*

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Interest of the *Amicus*

The Commonwealth of Massachusetts maintains numerous public institutions of higher education[1] employing

[1] These are the University of Massachusetts with campuses at Amherst, Boston and Worcester, eleven State Colleges in all parts of the Commonwealth, Southeastern Massachusetts University, Lowell Technological Institute, and various Community Colleges throughout the Commonwealth.

hundreds of teaching personnel, both tenured and non-tenured. Recently, considerable litigation has arisen in the United States District Court for the District of Massachusetts involving both the procedural and substantive constitutional rights of non-tenured teachers at public institutions who have been denied renewal of their employment contracts. The central issues raised in the present case have been raised in such litigation. The United States Court of Appeals for the First Circuit, in a case arising in New Hampshire [2], has reached a result different from that reached by the Seventh Circuit in the present case, and indeed different from the result reached in any of the other Circuits which have considered these issues. The Commonwealth has a substantial interest in the resolution of the conflict among the Circuits on this issue, and in a full and final delineation of the rights and obligations both of State educational institutions and of non-tenured faculty. The Commonwealth likewise has an interest in a solution which, while protecting the rights of individuals, does not place a constitutionally unnecessary administrative burden on public educational institutions, thereby inhibiting their exercise of a sound discretion in crucial areas of academic policy and decision-making.

Argument

I. THE BURDEN OF DEMONSTRATING THAT THE REASONS FOR HIS NON-RETENTION ARE CONSTITUTIONALLY IMPERMISSIBLE RESTS UPON A NON-TENURED OR PROBATIONARY TEACHER AND HE IS NOT ENTITLED TO A STATEMENT OF REASONS OR A HEARING.

[2] *Drown* v. *Portsmouth School District*, 435 F. 2d 1183 (1970), *cert. denied*, 402 U. S. 972 and *Drown* v. *Portsmouth School District, et al.*, Docket Number 71-1247, decided December 1, 1971. See also *McEnteggart* v. *Cataldo, et al.*, Docket Number 71-1254, decided December 1, 1971.

Where a non-tenured teacher in a public institution is denied re-employment because of the exercise of First Amendment or other Constitutional rights, or on account of race or other impermissible discriminatory criteria, his right of action under 42 U. S. C. § 1983 would appear to be firmly established. *Slochower* v. *Board of Higher Education of New York City*, 350 U. S. 551; *Johnson* v. *Branch*, 364 F. 2d 177 (C.A. 4, *en banc*, 1966), *cert. denied*, 385 U. S. 1003 *Freeman* v. *Gould Special School District of Lincoln County, Arkansas*, 405 F. 2d 1153 (C.A. 8, 1969), *cert. denied*, 396 U. S. 843. The Court is here faced, however, with the question of the procedural due process rights to be afforded a non-retained, non-tenured teacher in the absence (in the present posture of the case) of any allegation that the decision not to rehire was based upon Constitutionally impermissible reasons. The United States Court of Appeals for the Seventh Circuit has held, in affirming the judgment of the United States District Court for the Western District of Wisconsin, that the respondent here was "entitled at the administrative level to be offered a statement of the reasons why he was not to be retained and a hearing at which he could respond." *Roth* v. *Board of Regents of State Colleges, et al.*, 446 F. 2d 806, (C.A. 7, 1970). The Commonwealth of Massachusetts submits that this holding unfairly shifts the burden of establishing the Constitutional sufficiency of the decision not to rehire the respondent onto the petitioners. If upheld, such a requirement will destroy the patiently-developed system by which probationary teachers are evaluated, advanced or released in Wisconsin, in Massachusetts, and throughout the nation, to the ultimate detriment of the teaching profession and to the great damage of public education.

In the present case, the respondent alleged "that the reason for petitioners' decision not to retain him for the

school year '69-'70 was to retaliate for [his] constitutionally protected expression of opinion. . . ." 446 F. 2d at 808. The *Amicus* would join with the petitioners here in contending that such a proposition is for the respondent to prove "in the branch of this case which is not now before us." *Ibid.* This is so not only because "government employment, in the absence of legislation, can be revoked at the will of the appointing officer," *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 896, but also because the Court of Appeals' "acceptance of [the] format of argument has resulted in the unnecessary decision of a constitutional question. . ." *Roth, supra*, 446 F. 2d 806 at 814 (Duffy, J., dissenting). In addition, to shift the burden from the non-tenured employee to the employing institution would be an unwarranted and destructive intrusion into the delicate workings of the academic hiring and tenure system as it exists, with minor local variations, across the country.

The essence of the distinction between non-tenured or probationary employment status and academic tenure is in the discretion exercised by educational institutions in evaluating probationary teachers on subtle and varied bases often incapable of precise articulation. This the District Court in the present case appears to have conceded, stating that "it is reasonable that there be available a wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer." *Roth* v. *Board of Regents*, 310 F. Supp. 972, 978 (W. D. Wisc. 1970). The relationship of an institution to its non-tenured faculty is an experimental one, a trial period for both parties. "It certainly implies no commitment for continuance of employment, if for any reason the experimental relationship leads to the conclusion that a more extended relationship may be unsatisfactory." *Rhine* v. *International Young Men's Christian Association College*,

339 Mass. 610, at 613 (1959). Such a conclusion may be reached for a variety of reasons. The teacher may be unobjectionable, but others may be preferred for the limited positions available. Evaluating personnel may differ in their reasons for desiring not to retain him, thus making an agreement on the "reason" impracticable. A teacher may be personally objectionable to individual colleagues, making his continued presence a divisive influence in an academic department. Cf., *McEnteggart* v. *Cataldo, et al.*, Docket Number 71-1254 (C.A. 1, decided December 1, 1971). To require, as the decision of the Court of Appeals in effect does,

> . . ."that a college must always assign a cause for not renewing the contract of any teacher on its staff, would have the legal effect of improperly denying to colleges freedom of contract to employ personnel on a probationary basis or under annual contracts which are unfettered by any re-employment obligation. Every teacher would thus be granted substantial tenure rights by court edict. Courts do not make contracts for colleges or teachers any more than for any other litigants." *Sindermann* v. *Perry*, 430 F. 2d 939, 944 (C.A. 5, 1970), *cert. granted*, 403 U. S. 917.

To require a statement of reasons and an administrative hearing even in the absence of allegations of substantive Constitutional infringement would cripple the functioning of the non-tenured or probationary employment relationship. Academic personnel would be caught up in constant administrative detail. The necessity of articulating "bases for non-retention enjoying minimal factual support and. . .supported by subtle reasons," *Roth, supra*, 310 F. 2d at 979, and of sustaining them in a trial-type hearing would be a strong detriment to the exercise

of that judicious discretion which is the cornerstone of the evaluative process. The tendency, inevitably, would be to retain mediocre or objectionable non-tenured faculty rather than incur the procedural burden of sustaining a decision not to rehire. The appointment of the freshest and most untried junior faculty member at a public institution would immediately harden into a permanent relationship severable only at the cost of potentially divisive and acrimonious quasi-judicial proceedings. The implications for the continued upgrading of the nation's public college facilities would be, at the least, unfavorable.

The Court is not here asked to weigh the interest of the probationary teacher in being free of unconstitutional exclusion from public employment. That interest is already amply protected by the availability of that remedy which this respondent has pursued in the as yet unlitigated facet of the present case. What the Court is asked to do, however, is to extend to all such teachers the benefits of indefinite tenure, terminable only for cause. Such a wholesale creation of substantial new rights with regard to public employment cannot be fitted under the umbrella of the due process clause.

II. In The Alternative, Providing The Respondent With A List Of Reasons For The Decision Not To Rehire Him Is A Sufficient Safeguard Of His Constitutional Rights, And The Further Requirement Of A Hearing Is Of Illusory Benefit To Him And Of Great Potential Harm To Public Education.

In the alternatives, the *Amicus* submits that the issue presented by the instant case may be resolved on a basis other than that suggested either by the petitioners or the respondent in the Court of Appeals. The constitutional interests of the respondent and the administrative exigen-

cies of the petitioners might at once be preserved by requiring that the respondent be given the reasons for his non-retention without providing him with an administrative hearing. The respondent might then know the basis for the decision not to rehire him, and, if the reasons were constitutionally impermissible, or palpably insubstantial, or if he determined that the reasons given were false and not the real reasons, he would be aided in any attempt, under 42 U. S. C. § 1983 or otherwise, to demonstrate their insufficiency. At the same time, the burden of proving such insufficiency would rest with the respondent, and the petitioners (and public educational administrators throughout the country) would not be faced with the prospect of holding a quasi-judicial hearing each and every time they wished to sever a relationship with a non-tenured faculty member.

This approach has been taken by the United States Court of Appeals for the First Circuit in the case of *Drown v. Portsmouth School District*, 435 F. 2d 1182 (1970), *cert. denied*, 402 U. S. 972. In that case a public high school teacher without tenure was given timely notice of the school district's decision not to rehire her for the following year. She sought a list of reasons for this decision and a hearing in which to challenge them, and, when these were denied, she commenced an action in the United States District Court under 42 U. S. C. § 1983. As in the present posture of the instant case, no claim was there raised of the violation of any of her collateral constitutional rights.

The Court of Appeals weighed, first, the competing interests of the teacher and the school district in letting the teacher know the basis of the decision. The court reasoned that notice to the teacher would give her the opportunity informally to correct factual mistakes, to develop evidence of a constitutionally impermissible basis for the decision, or, if the reasons given were not the true rea-

sons, to demonstrate that falsity and thus develop the fact that the reasons lay elsewhere and were improper. Against this interest, the court assessed the administrative inconvenience to the school board. It concluded that since periodic evaluations are in any event a widespread practice, and that in some states reasons of the type sought are statutorily required, the administrative burden would be minimal. The Court therefore held,

> ". . .that the interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and that the inconvenience and disadvantage for a school board of supplying this information are so slight as to require a written explanation, in some detail, of the reasons for non-retention together with access to evaluation reports in the teacher's personnel file," 435 F. 2d at 1185.

The court went on to consider the plaintiff's request for a hearing and concluded that to grant one would be an unwarranted burden on the school board and of limited value to the teacher. The Court first noted that any hearing, to be meaningful, "would involve the full trappings of counsel, cross-examination, rules of evidence, a verbatim record, and a decider other than the school board." *Ibid.* While the precise nature of the hearing ordered in the instant case is unclear from the court of appeals' decision, if it is not to be a sham it must presumably include some or all of the procedural safeguards listed above. The court in *Drown* went on to note the inhibiting effect that requiring such a proceeding would have on the willingness of school boards to let a mediocre teacher go or, indeed, to hire any but the blandest and most innocuous candidates in the first place. "Such risks and burdens," the Court felt, "might be tolerable if the right to a hearing gave promise of

high and unique usefulness in safeguarding the protectible interests of the non-tenured teacher." 435 F. 2d at 1186. On inquiry, however, the court concluded that such a hearing would not have that effect:

> "One interest might well be the opportunity for a probationary teacher in the system to explain his teaching philosophy and methods, which may be at odds with those of his supervisor. But in the light of the school board's wide discretion, and its prerogative to be short-sighted and narrow-minded, a hearing would not be likely to settle the clash of the value judgments any more effectively than informal discussions. . . . A second interest may lie in identifying factually incorrect reasons for non-retention. Once again, if the teacher is made aware of the reasons, and if the school board is acting in good faith, the machinery of a hearing would not appear to be necessary to clear up the misunderstanding.
>
> "There remain the teacher's interest in protecting his constitutional rights, such as free speech, and in protecting himself against a decision made in bad faith. It is not easy for us to believe that a significant number of decisions not to rehire non-tenured teachers rest on either ground. In any case, the teacher asserting a constitutional right has guaranteed access to the federal courts. . . . From the teacher's point of view, there is little reason for him to prefer the prospect of two full-scale constitutional presentations where one could suffice. As to the teacher's interest in guarding against bad faith decisions, we first observe that, as we have noted, the requirement that detailed reasons be assigned is some hindrance to a board so motivated. Secondly, bad faith may rise to a constitutional level, in which case the federal courts are avail-

> able, or, if not of this magnitude, it may be subject to a state court remedy in tort. .... Moreover, an absolute safeguard against the possibility of covert bad faith would involve school boards delegating crucial rehiring decisions to third parties—a resolution which would spawn a host of other problems not the least of which would be the erosion of the educational policy function of school boards. On balance, we conclude that the residual possibility of decisions made in bad faith concerning non-tenured teachers does not justify the judicial imposition on the public school systems of the nation of adjudicative hearing procedures." 435 F. 2d at 1186-1187.

In the present case, the district court made it clear that in the hearing which it mandated, the "standard is intended to be considerably less severe than the standard of 'cause' as the latter has been applied to professors with tenure." 310 F. Supp. at 979. This language is cited with apparent approval by the court of appeals, 446 F. 2d at 808. It is difficult to imagine how such a hearing would be a meaningful safeguard for the teacher, or how, practically, the administrators of a public institution could conduct one according to such a standard. A tenured professor is normally one who has weathered a probationary period and has passed muster with colleagues and employers alike. The reasons for a person's acceptance may be incapable of articulation. But, he may thereafter be dismissed, generally, only after hearing and for "cause"—that is, for a failure to live up to comparatively well-defined and minimal requirements of competency and professional conduct. Whether he suits or pleases the faculty or administration in every vague particular is no longer at issue; specific violations of his manifest obligations of professional and personal conduct are required if he is to be removed. On the other hand,

"... the college may base its decision not to re-employ a teacher without tenure or a contractual expectancy of re-employment upon any reason or upon no reason at all." *Sindermann* v. *Perry, supra*, 430 F. 2d 939 at 944. Such a teacher may not be denied re-employment for a constitutionally impermissible reason; but if he is given a list of reasons, and wishes to challenge them on constitutional grounds, the courts which are always open to him are a far more competent constitutional forum than an administrative hearing.

The court in *Drown, supra*, speculated that "bad faith may rise to a constitutional level." 435 F. 2d at 1187. Here, too, it felt that proper redress should be had in the courts. That such cases must be rare, and the burden of a teacher in overcoming the broad discretion of his employers heavy, may be seen from the subsequent history of the *Drown* case.

Pursuant to the court's first decision ("*Drown I*"), the plaintiff was given a list of the reasons for her non-renewal. These were that she had reported illness on a day that she attended a teachers' association meeting to which she was not a delegate; that while her classwork was satisfactory, her department reported her to be uncooperative and resistant to direction; and that she had refused to meet with an administrator regarding her personal situation. *Drown* v. *Portsmouth School District*, Docket Number 71-1247, page 2, decided December 1, 1971, ("*Drown II*"). The plaintiff attacked these reasons in the district court as arbitrary and capricious and in violation of the Fourteenth Amendment, and, upon dismissal of her claim there, appealed. "*Drown II*," *supra*, page 1.

The court of appeals recognized that "even the minimal interest of the non-tenured teacher in renewal of her contract cannot be taken away for reasons which are entirely arbitrary and capricious." The court went on to suggest

three ways in which a reason may be arbitrary and capricious: first, it "may be unrelated to the educational process or to working relationships within the educational institution;" second, it may be egregiously trivial; and, third, it may be "wholly unsupported by a basis in uncontested fact." *Drown II*, *supra*, p. 3. "To state a claim under 42 U.S.C. § 1983," the court continued, "a teacher must at least attack each of the stated reasons on one of the grounds indicated. . . ." *Ibid*, page 3. The court concluded that the plaintiff had failed to do so successfully and affirmed the judgment below. *Ibid*, pp. 4-5.

In what way would the plaintiff in *Drown* or any teacher similarly situated, have been aided by an administrative hearing? Since her right to a reversal of the decision not to rehire her would depend upon the presumed bad faith of her employers, a hearing before them would be a solemn farce. Cf. *Chase* v. *Fall Mountain Regional School District*, 330 F. Supp. 388, 395 (D. N.H. 1971).[3] Likewise, since differences of attitude and philosophy would lie within the discretion of the educational administration, the inability to persuade them to relent informally would insure the futility of an adjudicative proceeding. Finally, as has been noted above, the allegation of a substantive constitutional deprivation raises issues beyond administrative competence. The imposition of a requirement for a hearing would have little or no salutary effect, but would more likely result in the hardening of attitudes and the unnecessary generation of turmoil and acrimony. More importantly, it would be a grave deterrent to the exercise by educational authorities of that discretion and selectivity which the needs of public education demand.

Since reasons for non-retention usually do exist, to require that the reasons be stated may not be unduly burdensome. This is not to concede, however, that a statement of reasons is required by the Due Process Clause. To

[3] Defendants' appeal docketed with the First Circuit, November 23, 1971.

require a hearing, however, even in the absence of allegations of substantive constitutional violations, would be of illusory benefit to the individual employee and would only promote an unwholesome ossification of educational personnel through the length and breadth of the land.

Conclusion

The Commonwealth of Massachusetts respectfully urges that the decision of the court of appeals should be reversed, either *in toto* or at least with respect to the requirement of a hearing.

Respectfully submitted,

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